BEFORE THE
NATIONAL LABOR RELATIONS BOARD

IN THE MATTER OF	:	
	:	
INTERNATIONAL BROTHERHOOD OF TEAMSTERS	:	
AND ITS AFFILIATED LOCAL UNION NO. 776	:	
(UNITED PARCEL SERVICE),	:	
RESPONDENT	:	***CASE NO. 04-CB-166651***
	:	
AND	:	
	:	
HENRY HAIRSTON, AN INDIVIDUAL,	:	
CHARGING PARTY	:	

INTERNATIONAL BROTHERHOOD OF TEAMSTERS	:	
AND ITS AFFILIATED LOCAL UNION NO. 776	:	
(UNITED PARCEL SERVICE),	:	
RESPONDENT	:	***CASE NO. 04-CB-170828***
	:	
AND	:	
	:	
JAMES WISE, AN INDIVIDUAL,	:	
CHARGING PARTY	:	

BRIEF ON BEHALF OF
RESPONDENT
INTERNATIONAL BROTHERHOOD OF TEAMSTERS
LOCAL UNION NO. 776

Facts and Procedural History

This matter comes before the Chief Administrative Law Judge pursuant to an Order of Dennis P. Walsh, Regional Director, Region Four of the National Labor Relations Board, dated July 14, 2016, in which the two instant matters were consolidated subsequent to the issuance of a Complaint and Notice of Hearing in case number CB – 166651 on or about June 27, 2016. Respondent, international brotherhood of Teamsters local union number 776 filed and properly served its answer to the Order Consolidating Cases,

Consolidated Complaint and Notice of Hearing, along with its Affirmative Defenses on or about July 26, 2016. The underlying charge against the union in case number 04 – CV – 166651 was filed by Charging Party Hairston on or about December 28, 2015 and was amended by Charging Party Hairston on or about May 31, 2016. The underlying charge in case number 04 -CB – 170828 was filed by Charging Party Wise on or about March 2, 2016 and was first amended on or about March 22, 2016 and subsequently further amended on or about June 27, 2016.

An evidentiary hearing was conducted before the Honorable Robert A. Giannasi, Chief Administrative Law Judge, on Monday, February 6, 2017 in Philadelphia, Pennsylvania.

The allegations in the Consolidated Complaint regarding coverage under the Act are uncontested, for the purposes of the instant brief and, as such, will not be the subject of the attention of this submission.

The essence of the underlying charges are alleged claims of violations of Section 8(b)(1)(A) of the Act based upon putative conduct by the Respondent allegedly restraining or coercing employees in the exercise of their Section 7 rights under the Act and alleged claims of attempting to cause, and causing, an employer to discriminate against its own employees in violation of Section 8(a)(3) of the Act which conduct is alleged to have been in violation of section 8(b)(2) of the Act. The substantive factual allegations and the putative statutory violations alleged against the Respondent are articulated in Paragraph 5 (a through k), inclusive, of the Consolidated Complaint. Collectively those allegations assert that the Respondent engaged in arbitrary, perfunctory, discriminatory and/or bad faith conduct with respect to the Charging Parties and has breached its fiduciary duty it holds

with respect to the charging party in case number 04 Dash CB – 170828, James Weiss, and the Bargaining Unit. Respondent has timely and seasonably denied both the factual allegations against it and the legal conclusions asserted against it as more fully found in its Answer and Affirmative Defenses filed on or about July 26, 2016 in the instant matter.

At the evidentiary hearing all witnesses, with the exception of Edgar Thompson, President of Respondent, Local 776, were sequestered at the request of Counsel for the General Counsel in conformity with the rule of the *Greyhound* case regarding sequestration, and, with the exception of Mr. Thompson, did not hear or observe the testimony of any other witness.

Wayne Foulke, Labor relations manager for the underlying employer associated with the instant matter, UPS, he testified on behalf of the General Counsel. Mr. Foulke identified GC exhibits two and three respectively as the National Master United Parcel Service Agreement with the International Brotherhood of Teamsters ("IBT") for the period of 2013 to 2018 and the Central Pennsylvania Supplement to that Agreement applicable to the same time period for six affiliated Local Unions of the IBT including Respondent Local Union No. 776. Foulke testified, generally, about his perception of the operation of the collectively bargained grievance and arbitration procedure and with respect to annual bidding at the Harrisburg Hub of UPS. He testified further, with respect to the jobs available for the bid that as among the three potential positions, shorter, package handler and shifter/jockey, that while the positions have different rates of pay, the employer alone reserves the right to assign employees into any position it chooses within that classification. (Transcript at pages 21 through 22) (hereinafter "Tr at ___-___"). Specifically, with

respect to bidding employees, such as charging party Wise, who have an *accommodation*, the employer's Labor Relations Manager testified that while anyone in the unit could bid on a job through a bidding process, they will not receive a particular job assignment for which he or she is not qualified based on lack of skills or based on an accommodation to a medical limitation or condition. (Tr. at 25-26). This witness further testified that yes, "an employee..." bids on a position and is not awarded it, the *employee* may file a grievance. (Tr. 27). On cross-examination this witness further testified that *employees*, that is bargaining unit members such as Charging Party Wise, can and do file grievances under the applicable collectively bargain agreement *personally*. (Tr. 28). He further testified that he better for any particular position must be able to perform the essential job functions of that position or are not eligible to be awarded a bid on that position. (Tr. 30 - 31). Foulke also testified that the bidding process is conducted by the employer and would go on regardless of the presence of a union representative. (Tr. 33-34). Upon re-cross examination, Foulke testified that the only person of whom he was aware that secured any disability accommodation for any of the jobs on the bid list that was introduced as GC Exhibit number 4 was the charging party, James Wise. On that subject he indicated that Mr. Wise had not sought any modification of his initial ADA accommodation first implemented, at Wise's request, in 1996. (Tr.37-39). Finally, Foulke testified, that he is unaware of any employee with a ADA type accommodation that has ever bid on and been awarded the Sorter position upon which Wise's charge of unfair practice is based.

The General Counsel solicited testimony from charging party, James Wise. Wise testified that he works as a *Package Handler* at the UPS HUB in Harrisburg Pennsylvania. He stated that in conjunction with the 2016 bidding he bid on a position of *sorter* and was

very high on the overall seniority list. He further testified that between 2005 and 2009 he had held the sorter classification. Wise testified, that he bid on the sorter position on the 2016 bidding if he subsequently learned that his name was, "whited out," from that bid and placed in a position on the bid sheet for a package handler position. He stated that he had been told by a co-worker that this change on the bid sheet was undertaken by union steward, Robert Sholly. (Tr. 42-45). Wise further testified that Sholly allegedly stated, regarding Wise, that, "... this motherfucker is always getting in my way...," and that this putative statement was uttered in the presence of Respondent's Business Agent, David Licht. Neither Licht nor Sholly was in the hearing room for this testimony of Wise nor in the hearing room when the other of them was later testifying. Neither Sholly nor Licht, recalled that claimed utterance. (Tr. 45, 150, 168-169). Wise also testified that Licht said that, "...we should grieve..." some unspecified claim and also that Wise had a discussion with Licht about an hourly wage differential between the Sorter classification and the Package Handler classification (Tr. 45-46), and that Sholly allegedly told Wise, "we're going to grieve this..." about a day later. (Tr. 46-47). Sholly testified that neither he nor Licht stated that a grievance was to be filed on behalf of Wise regarding the situation and that Wise never asked him to file such a grievance (Tr. 150-151) and that there was no grievable offense associated with the situation (Tr. 151). Sholly also testified that he was not aware of any discussion among himself, Licht and Wise regarding any pay rate differential between the classifications. (Tr. 151.) Licht testified in this regard, with specificity, that he did not assert that he would file a grievance on Wise's behalf regarding the bid situation and that he said nothing about back pay or pay rates. (Tr. 169). Licht further testified in this regard that in his experience, "Most grievances [at UPS] are filed by the

member, by the grievant...In fact, I told Mr. Wise that if he felt his rights were violated he certainly has the opportunity to file a grievance. I never said I was going to file. I said he has the opportunity to file a grievance, just like any member does..." (Tr 169). Licht further testified that he did not explore the hourly pay difference between the Sorter and the Package Handler classifications with Sholly or Wise and that at no time did Licht lead Wise to believe a grievance was being filed or considered regarding the 2016 bid situation. (Tr 169-171).

Respondent Local Union 776 President, Edgar Thompson, testified regarding the operation of the annual bidding process in which charging party Wise, among others, was a participant in 2016. Thompson describe the role of the union steward, in this instance Robert Sholly, where the union and the employer have an agreement to conduct the bidding together, with the union observing and assisting with filling out bids to be certain that things run smoothly. Thompson testified that it was appropriate in such a collaborative context for the steward to remove and replace Wise's name in this situation because of the steward's unique knowledge of Wise's limitations and accommodation that prohibited him from performing some of the duties of the job for which he had bid. (Tr. 119-121).

Wise also testified regarding a document marked as General Counsel Exhibit 8, a letter sent from Wise to Local 776 President Edgar Thompson. Regarding this exhibit, wise initially testified that it was a letter he sent to Mr. Thompson about, "[A] jockey bid that [Wise] had signed previously..." He then, virtually immediately, modified that testimony to a description of the exhibit as being a letter that he sent to Mr. Thompson about

a jockey bid that someone else had signed and of which he asserted no one else knew. (Tr. 48-49). Wise further testified that he received a call from Thompson regarding the letter embodied in General Counsel Exhibit 8 but that he did not engage in that telephone conversation because he was otherwise busy and he did not undertake to follow up on the telephone call. (Tr. 49-50). Thompson also testified regarding this GC Exhibit 8. Thompson's testimony indicated that upon receipt of the letter, he contacted the business agent responsible for that area of UPS Freight and secured his explanation of the situation. Thompson further testified that he and the business agent together called Mr. Wise to, "try to set up a meeting..." Tr. 122). Wise responded to Thompson by indicating that at the time of the call he was unavailable to talk. Thompson asked him to call back when he was available and Wise never called back. (Tr.122). Thompson also testified that he called wise again about a week later and never received a return call from Wise regarding the letter embodied in General Counsel Exhibit 8. On the more general topic of the Wise letter embodied in General Counsel Exhibit 8, Thompson testified on the topic of the responsibility for notification of bargaining unit members of jobs available for bid and in that regard Thompson testified that the responsibility for bidding on specific vacancies is taken by bargaining unit members themselves and not by the union steward. (Tr. 123-125). Wise also testified, with respect to the 2016 bid, that he was never restricted or prohibited by the Respondent Union from filing a grievance and that he never asked to see a copy of the grievance he had testified that he was told was being filed on his behalf and never signed any grievance in this regard. (Tr. 64). Additionally, Wise admitted that at least as of 2011, he was subject to an ADA accommodation from the company that prohibited him from performing all of the duties of the sorter classification. (Tr. 66).

On cross-examination, Wise identified GC Exhibit 9, and asserted that the document is an accurate reflection of his medical restrictions and that his restrictions had not changed since the date on the letter of 1996. (Tr. 53-54). He went on to indicate, at some length, that his restrictions qualified him for work in, "small sort." (Tr. 53-56). Witness Robert Sholly identified Respondent's Exhibit 1 as Charging Party Wise's relevant ADA accommodation description with which he was familiar. He went on to testify that the document indicated that Charging Party Wise sought and was granted an accommodation to limit his activity to the duties associated with, "small sort bagger." Sholly further testified that the "small sort bagger position" is a "package handler" classification and not in the "sorter" classification for which Wise had bid, a bid Sholly modified on the bid sheet identified as General Counsel Exhibit 4. Finally, on this point, Sholly testified that he relied upon Respondent's Exhibit 1 when he advised the employer that Wise had signed up for the wrong classification. (Tr 146-147) and that the employer had contemporaneously advised him that Wise's accommodation was in force without modification as of the date of the 2016 bids. (Tr 159-160). Related to this topic, Sholly also testified that in 2011, Wise had filed a grievance regarding not receiving the pay rate for the sorter classification. And the decision on that grievance was that Wise, "...gets paid for the job he does, which was the package handler..." classification. (Tr. 146-147).

Wise testified further, on cross examination, that from 2009 through the bidding of 2016 he did not get the pay rate for the sorter classification but he never filed a grievance regarding this issue despite knowing that he had the right to file such a grievance if he

believed that pay rate and classification assignment to have been a violation of his rights. (Tr. 59-61).

On redirect examination Wise asserted that there are, "five," employees of UPS Freight who have ADA accommodations and are classified as sorters and he proceeded to list five specific names. GC Exhibit 16 (a), however, a letter from employer counsel to counsel for the General Counsel indicates that only one of those five names holds a position of "Small Sort Bagger (pursuant to ADA accommodation)"... and that individual's pay rate, "should have been at the unskilled [Package Handler] rate: $33.11. In any event Mr. Wise [the Charging Party] is being paid at the correct rate for an unskilled Hub employee [Package Handler] pursuant to his own accommodation agreement..." Moreover, General Counsel Exhibit 16(b) is an agreement among the bargaining unit member so accommodated, the Respondent Union and the Employer reflecting that due to the accommodation the employee was no longer able to perform the regular duties of the Hub Sorter position and, as such, he was being reassigned, consistent with his accommodation to the lower paying, unskilled position of Small Sort Bagger, a position in the Package Handler classification, the same as the one held by Charging Party Wise pursuant to his 1996 ADA accommodation. In direct contravention of General Counsel exhibits 16 (a) and 16 (b), Wise testified that each of the five people he so named hold the Sorter classification and get the Sorters pay and they all have an accommodation or some type of physical problem.

The General Counsel took oral testimony from Charging Party Henry Hairston. Hairston generally described a hostile personal relationship that he has with Respondent Union Steward Leonard Monette. Hairston asserted that the hostility stems from Monette, who is white, using racial slurs toward Hairston, who is black, and that he had filed grievances and internal union charges against Monette. Hairston went on to describe two grievances that he had filed, identified as General Counsel Exhibits Numbers 10 and 11 and the processing of those grievances. He also identified General Counsel exhibit number 12, a document written by Hairston in response to a request from a UPS labor manager, Darran Pray, regarding events that allegedly happened between Mr. Hairston and Mr. Monette, which was given, at Mr. Pray's direction to respondent Union President, Edgar Thompson, Respondent Union Business Agent, Dave Licht and Mr. Pray. Hairston also identified General Counsel Exhibit Number 13, a letter to him from Business Agent Licht advising him of a meeting among the Union and the Company with respect to the grievance identified as General Counsel Exhibit Number 10.

The General Counsel also called Jason Nulton as a witness. Nulton testified that he held a position as a Union Steward at UPS Freight for Respondent Union Teamsters Local 776 between 2012 and 2015. (Tr. 93-94). Nulton went on to testify that he was informed, by Business Agent Licht of the filing of a grievance by Hairston regarding a claim of harassment attributed to Monette and that the employer wanted a statement from Nulton. Following this Nulton asserted a claim that Business Agent Licht told him, in two telephone calls and one face to face meeting, that if he gave a statement internal union Executive Board charges would be filed against him if Monette, "...got in trouble..." (Tr.

98-100). In that context Nulton further testified that when a meeting ultimately took place among Nulton, Pray and Licht, Nulton told Pray, "…I was not going to talk because unless the company was going to offer me some type of amnesty, something of that nature, protect me for my family and myself, I was in a situation where I could not – if I talked I was afraid I was going to get [union executive] board charges and I was going to lose my job…" he went on to claim that Licht actually heard this and that Pray subsequently told Nulton that the company would not "help" him. (Tr. 100-101). The General Counsel did not produce any telephone records to confirm the alleged telephone calls and Nulton testified that there were no witnesses…no one else was present…for the alleged face to face conversation between Nulton and Licht in which the putative threat of internal union charges was allegedly repeated to Nulton by Licht. (Tr. 99). Moreover, while Nulton testified that he appeared at the hearing pursuant to subpoena (Tr. 92) the General Counsel apparently did not subpoena Mr. Pray to corroborate even that aspect of Nulton's testimony in which he claimed to seek the Employer's assistance in protecting him or providing him with some security that he would not lose his job secondary to putatively threatened internal union charges. Nor did the General Counsel subpoena or produce bargaining unit member Owen Maslach who, presumably, would have had similar threats from Licht had they actually been made at all. It must be noted as well that Mr. Nulton did not claim, at any time in his testimony, that Licht threatened his job, a fine, or any punishment of any kind secondary to the claimed threatened internal union charges; he stated that he, personally and apparently through his own self motivation, determined that if such charges were filed he would, "…get [his] union card pulled…" but he never asserted that

Licht or any representative of the Respondent Union made any such specific threat of the consequence of such a claimed threat of internal union charges.

Union Business Agent, David Licht was called as a witness on behalf of the Respondent Union. Regarding Wise, Licht confirmed that he sought and received from the company the document that was identified as Respondent's Exhibit Number in order to confirm that Wise's accommodation limited his ability to perform all of the elements of the Sorter classification. He further testified that the accommodation as approved by the company and agreed to by Mr. Wise was for the position of Small Sort Bagger, in the Package Handler classification. (Tr. 167-168). Licht also testified that at the time of the events, he had inquired of Mr. Wise as to whether he had an accommodation and Wise refused to either confirm or deny the existence of an accommodation that limited or restricted his ability to perform the elements of the Sorter classification. (Tr. 168).

With respect to the Hairston event, Licht testified that he was among the three witnesses identified by Hairston in General Counsel Exhibit 12 and that Labor Manager Darran Pray ultimately interviewed Licht. Licht testified that Pray asked him to write a statement but he refused stating that he would not do so where he did not remember the details from nearly a year earlier. (Tr. 179-180). Licht went on to describe Pray's interview of Nulton that Licht attended. Licht heard Nulton tell Pray that he had heard some things but did not want to be involved. (Tr. 180). Licht heard Pray ask Nulton for a written statement to which Nulton initially responded in the negative and then later asked whether anyone else had given a written statement and stated that he would wait to see what

everyone else did. Nulton, as per Licht's testimony, refused to provide Pray with a statement. (Tr. 180-181). Licht specifically denies having any discussion with Nulton regarding the filing of internal union charges if Nulton offered any statement or testimony against Mr. Monette. Subsequent to the meeting among Nulton, Pray and Licht, Licht responded to Nulton's questions regarding what he should do by telling Nulton that the submission of a statement to Pray was Nulton's decision to make. He also testified that he did not recall having any telephone conversation with Nulton regarding potential consequences of his giving the Company a statement regarding Monette. (Tr. 182-182). Licht did not tell Monette about the company seeking statements from Nulton, Licht, Hairston or, later, Maslach. (Tr. 183). Also, with respect to the processing of the underlying Hairston grievance against Monette's conduct, Licht testified that the most recent activity was an assertion to him, from Pray, that the company is still awaiting written statements within a month prior to the hearing. (Tr. 188). Licht stated that while he was in the meeting with Pray and Nulton, he did not hear Nulton request amnesty or any form of protection from the company in return for his providing a statement. (Tr. 188).

Licht also testified regarding a strain in his personal relationship with Nulton based upon Nulton asserting that Licht did not fairly conduct a bargaining unit steward election that Nulton lost. (Tr. 189-190) and a separate incident in 2014 in which Licht refused to write a statement in support of terminating another unit member. (Tr. 190). Licht further commented on his understanding regarding the filing of internal union charges by indicating that he is not familiar with them and has never filed them or been a part of them; and

further, that if a member asks him about internal charges he refers them to the union's Secretary Treasurer who handles them. (Tr. 205-206).

II. Argument

The substantive factual and asserted statutory allegations in the General Counsel's Consolidated Complaint are found in its paragraphs 5-8 inclusive. The presiding Administrative Law Judge indicated, appropriately, at the hearing on the merits that there are serious credibility issues regarding the respective positions of the General Counsel and the Respondent Union. Respondent, of course, recognizes and agrees with that observation. And, Respondent respectfully suggests, as will be more fully discussed below, that those credibility issues are properly determined in its favor and against the General Counsel. That notwithstanding, Respondent believes that it is entitled to judgment as a matter of law, regardless of the resolution of those credibility issues, as a result of the General Counsel having failed to prove Respondent violated the Act based upon the evidence elicited at the hearing.

In Paragraph 5 (c) of the General Counsel's Consolidated Complaint, the General Counsel asserts that Respondent, by David F. Licht, at the Employer's facility, threatened a member of Respondent with the filing of internal union charges if the member acted as a witness in connection with Charging Party Hairston's July 15, 2015 grievance alleging racial harassment by one of the Respondent's shop stewards. Respondent has specifically denied this allegation in its Answer and Affirmative Defenses.

The evidence put forth by the General Counsel in support of the allegations in this paragraph of the Consolidated Complaint is based, exclusively, upon the oral testimony of a single witness, bargaining unit member and former Steward, Jason Nulton. As more fully discussed above in the description of Nulton's testimony, the General Counsel put forth no corroborating evidence regarding Nulton's extraordinary oral claims regarding these underlying allegations. Based upon Nulton's own testimony, there were no witnesses to either the alleged personal threat made immediately before a meeting with an employer representative or to either of the alleged threatening telephone calls, putatively initiated in each case, by Licht.

While witness Nulton's testimony regarding the two putative telephone calls during which the alleged threat was made fails to describe whether either of these alleged telephone calls were made or received on a landline or a cellular phone, the General Counsel failed to put forth any evidence of telephone records that would corroborate the claim of either or both of these telephone calls to have taken place. Nor did the General Counsel subpoena telephone records for the Respondent union or for Mr. Licht personally. Instead the General Counsel elects to rely exclusively on Mr. Nulton's uncorroborated assertions.

In this regard as well, Nulton claims that the entirety of his interaction with Employer Labor Relations Manager, Pray, subsequent to the alleged third and personal face to face threat of internal union charges putatively uttered by Licht, devolves around Nulton allegedly asking Pray for some form of amnesty or protection from adverse action in the

event that he provided the requested witness statement regarding the underlying grievance. Yet the General Counsel did not produce Pray as a witness to even verify, in any fashion, this extraordinary story of a former union steward and putatively committed union member, orally seeking the employer's protection from some unspecified theoretical harm, in the presence of the precise union official who ostensibly made the underlying threat of internal union charges against Nulton. Indeed, while Nulton testified that he appeared at the hearing pursuant to a subpoena, the General Counsel did not so much as imply that it attempted to issue a subpoena to secure Pray's testimony that surely would have corroborated the Nulton's bald assertions in this regard were they true and accurate.

Thus, from a pure credibility standpoint, we are left with a series of uncorroborated claims from Nulton for which there conveniently are no witnesses, no phone records and no validating testimony from a presumably readily available employer witness. Moreover, the General Counsel also failed to produce another obvious witness on this topic, bargaining unit member Owen Maslach. Maslach, presumably, would have been subjected to exactly the same kind of putative internal union charge threat that Nulton claims was imposed upon him on three separate uncorroborated occasions, were Licht to have been motivated to actually engage in such threats. As such, this foundational testimony cannot reasonably be given credence in the face of its own internal flaws and in the face of Licht's testimony, offered in the context of his prior sequestration at the request of the General Counsel, in which he categorically denies any such threats having taken place or even that he is possessed of a working knowledge of how internal union charges are initiated and processed.

Were that analytically the end of it, Nulton's testimony should be rejected as resoundingly not credible. However, even if the testimony as offered by Nulton was given some dimension of credence, it fails to meet with the legal standard necessary to have it be treated as a violation of the Act. While claiming that he feared retaliation by the union for offering a witness statement with respect to the underlying grievance, Nulton did not state that the claimed putative threat of internal union charges from Licht carried any generalized or specific consequence in the nature of a termination or compromise of his employment relationship with the employer, expulsion from the union or even of a fine from the union. Instead the entirety of his testimony on this essential point is that he feared internal union charges of an unspecified (and unexplored) result. Never did he attribute to Licht any assertion that the putatively retaliatory internal charges would result in any negative result for Nulton. Simply stated, Nulton offered *no testimony* claiming that in the alleged threat of filing the putatively threatened internal union charges, Licht even implied that the union was potentially engaged in an effort to cause the employer to discriminate against him in employment, work assignment or any emolument of employment. Nulton's testimony does not claim that the union, through Licht's putative threat of internal charges, carried with it a threat or even an attempt to cause any employer action. In *NLRB v Teamsters Local 639* (Curtis Bros), 363 U.S. 274, 45 LRRM 2975 (1960), our Supreme Court recognized and approved Board policy interpreting Section 8(b)(1)(A) as affording solely a limited prohibition on union tactics involving violence, intimidation and reprisals or threats thereof. *Curtis Bros. supra.* 362 U.S. at 290. Here, there is no testimony from

Nulton claiming that the putative threat of internal union charges involved violence, intimidation or actual reprisal nor did his testimony indicate that there was a threat of such conduct given that he did not attribute to Licht, even in his unsubstantiated testimony, a threat of any actual harm or reprisal associated with his claim of threat of internal union charges related to with continued employment or even his membership status in the union. Moreover, based upon Nulton's own putative personal belief associated with his oral testimony, his apparent concern regarding his unsubstantiated claim of a threat of internal union charges, is with respect to his continued union membership: "He said it to me three times, so I did question him about it, *because I'm not going to get my union card pulled*..." (Tr. 108) (emphasis supplied).In *Scofield v NLRB*, 394 U.S. 423, 70 LRRM 3105 (1969), the Court makes clear that a union may fine or discipline a member and not violate Section 8(b)(1)(A). In that vein it is clear that the Congress, by way of the proviso in that Section of the Act keeps discipline of union members a basically internal union matter by assuring that the Act does not impair the right of a union to establish its own rules regarding the securing or retaining of union membership. As such actual expulsion from union membership or even the threat of expulsion is not restraint or coercion under Section 8(b)(1)(A) of the Act. *American Newspaper Publishers*, 86 NLRB 951, 25 LRRM 1002 (1949), enforced *ANPA v NLRB*, 193 F. 2d 782, 29 LRRM 2230 (7th Cir. 1951). And, while it may be a violation of the Act by a union threatening a member with internal union charges for testifying against another member in an arbitration proceeding, NLRB v Electrical Workers (IUE) Local 745, 759 F 2d 533, 118 LRRM 3406 (6th Cir 1985) it must be recognized that the underlying matter *does not involve an arbitration proceeding.* With these statutory and case law interpretations as a backdrop, the putative threat of internal union charges

asserted by Nulton, even if found to have some dimension of credibility, may not, standing alone, be the basis for a finding of a violation of the Act by the Respondent Union; the General Counsel has failed to demonstrate that the conduct complained of is violative of Section 8(b)(1)(A).

In Paragraph 5(d) of the General Counsel's Consolidated Complaint, the General Counsel alleges that the Respondent Union, by its Steward. Robert J. Sholly removed the Charging Party Wise's name from the bidding list for a Sorter position on the annual job bid sheet. Responded Union has denied this factual allegation, as stated, based upon Charging Party Wise having not properly placed his name on the annual bid sheet for a Sorter position due to Wise's self reported medical condition in which his medical restrictions prohibit him from undertaking certain duties of the Sorter position. In paragraph 5 (e) of the General Counsel's Consolidated Complaint, the General Counsel alleges that the Respondent Union attempted to cause and caused the Employer to not consider and select Charging Party Wise for a Sorter position. Responded Union denies these factual allegations. The factual matrix underlying these two related Paragraphs of the General Counsel's Consolidated Complaint are the subject of dispute. While, as indicated above in the recitation of the substance of the testimony of the witnesses, there is no factual dispute regarding the Charging Party attempting to sign a bid for the Sorter position during the 2016 bid period or regarding Steward Sholly learning of that fact and placing Wise's name on the bid sheet for a Package Handler position; the significance and impact of those interrelated factors is in dispute. There can be no doubt, based upon Charging Party Wise's own testimony that from at least 2011 forward, he was aware that the Employer

deemed him to not be qualified for a Sorter position bid due to his medical restrictions limiting him. In each bid period from that point until 2016, Charging Party Wise did not even attempt to bid on a Sorter position and did not file a grievance regarding his apparent disqualification from bidding on that position. As such, his attempt at signing in 2016 is disingenuous. The fact that he undertook that action only in Sholly's weather related absence actually speaks volumes. Instead of being interpreted as conduct consistent with reasonable expectations, this conduct, on the part of the Charging Party is reasonably viewed as "trying to get one over" on the company and, more significantly in the context of the instant proceeding, to "get one over" on his fellow bargaining unit members who are qualified to hold the Sorter position and perform all of its essential functions. It must be recognized, in this context, that the Respondent Union has a duty to represent all of its members, not solely Wise, and, from that perspective, failing to participate in correcting an improper bid has the potential and actual impact of compromising the rights of countless other bargaining unit members whose bids fall like so many dominoes due to a single impermissible bid by a senior person such as Wise. Significantly, however, the testimony of UPS Freight Labor Relations Manager, Wayne Foulke, is instructive on this point. Foulke testified that he was not aware of any request by Wise to seek a change in his accommodation prior to or after his attempted bid in 2016. (Tr.37-38). Foulke further testified that the company would not make a change in any accommodation unless it was initiated by an employee, such as Wise, who had previously been accommodated. (Tr. 38). And, Foulke also testified that whatever limitations existed regarding Wise prior to the 2016 bids would be the limitations that applied to him at the time of the 2016 bids. (Tr. 39). Finally, in this regard, Foulke testified that the company (not the union) makes the

decision as to whether or not someone who signs a bid is assigned the position and that he is not aware of any employee with a medical accommodation restricting the individual from performing the essential duties of the Sorter classification who has bid on and received the position. (Tr. 39-40).

Sholly's testimony on this point is consistent with this description by Foulke. Sholly identified Respondent's Exhibit 1 as Wise's ADA accommodation sheet in which Wise and the Company agreed upon his accommodation and the specific job classification for which he is eligible to bid. Sholly further testified, without challenge, that Wise had even later initiated a grievance that he lost over this accommodation agreement limiting his bidding rights to the Package Handler classification. (Tr. 145-147). Under these circumstances if may not be reasonably asserted that the respondent Union caused or attempted to cause the employer not to consider and select Charging Party Wise for a Sorter position as claimed in the Consolidated Complaint. This course of conduct simply does not give rise to a claim attempting to cause and causing the employer to discriminate against Charging Party Wise in violation of Section 8(a)(3) of the Act in violation of Section 8(b)(2) of the Act. The Respondent Union is given a very broad range of reasonableness in representing its membership as a whole. Ford Motor Company v Huffman, 345 U.S. 330, 31 LRRM 2548 (1953). Nor may it be reasonably said that Respondent Union in the instant matter acted in an arbitrary or bad faith fashion given Sholly's good faith belief that Wise was not eligible for the Sorter position based upon his accommodation, a proposition that the Company clearly shared. Most significantly in this regard, Charging Party Wise

did not claim or factually assert that there was an animus related to Section 7 rights associated with the modification of his improperly attempted bid. As such, no violation of Section 8(b)(1)(A) or 8(b)(2) of the Act may obtain.

Charging Party Wise further testified, at length, that Business Agent Licht and Steward Sholly had committed to filing a grievance over this matter associated with Wise improperly bidding on a Sorter position. The allegations in General Counsel's Consolidated Complaint at Paragraph 5 (f-i) relate to this assertion of a failure to file a grievance and Respondent Union has denied each of them as more completely set forth in its Answer and Affirmative Defenses. Both Licht and Sholly, independent of one another, testified that not only was no such commitment made but that Licht advised Wise that he could file a grievance if he so chose. What is significant in this particular regard is Wise's own testimony that simply lacks any semblance of credibility. He stated that he never signed a grievance, never asked to see a grievance and never followed up in talking to the Business Agent about the putative grievance, even going so far as to refuse to provide his phone number for a call back from the Business Agent. Yet he would have the Board believe that that he had some expectation that a grievance was filed over his removal from a bid on a position for which he was not qualified due to a self imposed medical accommodation. And, his credibility is further dramatically compromised when we recognize that his claim of 5 other employees with medical accommodation holding the Sorter Classification id refuted in its entirety by the General Counsel's submission of Exhibit 16 (a-e). (In an effort to not unreasonably delay or burden these proceedings Respondent Union hereby withdraws its objection to GCX 16 a-e).

In order to sustain a complaint of such unfair practice related to a claim of a union inducing an employer to discriminate against an individual such as Wise, there must be some factual basis of such claimed discrimination; here there is none. Nor may it be reasonably claimed that the motivation behind the Sorter classification be reasonably described as retaliation by Respondent because of his complaints about Sholly as alleged in Paragraph 5 (j) of the Consolidated Complain and as denied by Respondent in its Answer and Affirmative Defenses. While we have the naked claim of this animus in Wise's testimony, it is not corroborated by the testimony of any other witness and is specifically denied by two separate and sequestered witnesses.

Conclusion

For the reasons set forth herein and based upon the authorities set forth herein, Respondent, International brotherhood of Teamsters Local Union No. 776, respectfully requests that the General Counsel's Consolidated Complaint in the instant matter be dismissed with prejudice and that the respondent be determined to have not engaged in conduct that is in violation of the Act.

Respectfully submitted,

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Dated: 3/17/2017